IN THE

Supreme Court of the United States

October Term, 1920.

No. 397.

WILLIAM HOLLIS and SAM GOODMAN,
Appellants,

vs.

CHARLES W. KUTZ, Chairman; LOUIS BROWNLOW and W. GWYNN GARDINER, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, AND AS SUCH CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, AND THE WASHINGTON GAS-LIGHT COMPANY,
Appellees.

PETITION FOR REHEARING

Now come William Hollis and Sam Goodman, appellants, and hereby petition the Court to set aside the judgment heretofore granted in this case and to grant a rehearing, and in support of this petition respectfully say:

The Court erred in affirming the decree dismissing appellants' bill because:

1. It does not appear from the record, neither do appellees contend, that the appellee Gas Company's business was instituted or permitted to be established in the District of Columbia on the condition that the needs of the General and District Governments as to gas shall be satisfied at any price that the Government may fix.

2. It does not appear from the record, neither do the appellees contend, that the appellee Gas Company's plant is operated as a Government institution and for the primary purpose of serving the General and District Governments to the exclusion, if necessary, of the private users of gas in the District of Columbia.

3. Said Gas Company is a private enterprise, doing a public business—one of the public utilities of the District of Columbia—and recognized as such by Congress in the Public Utilities Act, 37 Stats., p. 974.

4. The bill alleged facts showing the Government rate for gas as prescribed by Congress and subject to adjustment or change by the Utilities Commission to be far below cost of production and that the rates to appellants and other private consumers in the District of Columbia as fixed by the Public Utilities Commission in the orders complained of were made sufficiently high to make up the losses which otherwise would be sustained by the Gas Company by reason of said low Government rate, it further appearing in said bill that such rates to appellants and other private consumers in the District were arrived at by advances from the

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statutory rate, and *for the purpose* of enabling "the company to sustain its credit and conduct its business at a reasonable profit."

5. The bill alleged facts showing that the rates to certain excepted consumers in the District, and which rates are subject to regulation by the Utilities Commission, were far below cost of production, and that the rates to appellants and other private consumers in the District as fixed by the Public Utilities Commission in the orders complained of, were made sufficiently high to make up the losses which otherwise would be sustained by the Gas Company by reason of said low rates to such excepted consumers, it further appearing in said bill that such rates to appellants and other private consumers in the District were arrived at by advances from the statutory rate, and *for the purpose* of enabling "the company to sustain its credit and conduct its business at a reasonable profit.

6. The bill alleged facts showing that the rates to the appellants as fixed by the Public Utilities Commission in the orders complained of, are unduly discriminatory *as against them and in favor of the Governments and other excepted consumers* who receive gas from the appellee Gas Company at prices far below cost of production, and that the rates to the appellants as fixed by said Commission in the orders complained of, were made *in disregard* of the rates being charged to the Governments and other excepted consumers, *and when said Commission should have considered and fixed rates to the latter as well as to the former,* and thereby prescribe reasonable and non-discriminatory rates *to all users* of gas in the District of Columbia, as required by the Public Utilities Act. (*Southern Pacific Co.* vs. *Interstate Com. Com.,* 219 U. S. 433.

7. The bill alleged that order No. 314 in Formal Case No. 70, fixing the 95-cent rate to private consumers, prescribed on March 15, 1919, being the second order complained of, was arrived at and made *without the statutory notice of hearing* having been given to certain parties to the hearing. *Interstate Com. Com.* vs. *L. & N. Railroad,* 227 U. S., 88.

THE JUDGMENT OF THIS COURT AFFIRMING THE DISMISSAL OF APPELLANTS' BILL, AS EVIDENCED BY THE OPINION, IS BASED CHIEFLY ON THE CONCLUSION THAT THE GENERAL GOVERNMENT WHEN IT ALLOWED THE ESTABLISHMENT OF GAS WORKS IN THE DISTRICT OF COLUMBIA DID SO ON THE CONDITION THAT ITS NEEDS AND THAT OF THE DISTRICT SHOULD BE SATISFIED AT ANY PRICE IT MAY FIX.

The opinion states:

> But the notion that the Government can not make it a condition of allowing the establishment of gas works that its needs and the needs of its instrument the District shall be satisfied at any price it may fix strikes us as needing no answer. The plaintiffs are under no legal obligation to take gas nor is the Government bound to allow it to be furnished. If they choose to take it the plaintiffs must submit to such enhancement of price, if any, as is assignable to the Government's demands.

This statement implies, we most respectfully submit, a state of facts entirely different from those presented on the record. The appellee Gas Company is not a

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Government institution but is a private enterprise doing a public business—one of the public utilities of the District of Columbia, and so recognized by Congress in the Public Utilities Act, 37 Stats., 974, wherein, in paragraphs 1 and 2, it is provided as follows:

> The term "public utility" as used in this section shall mean and embrace * * * gas plant, gas corporation, etc.
> * * * * * * * * *
>
> The term "gas corporation" * * * includes every corporation * * * manufacturing, making, distributing, or selling gas for light, heat, or power, or for any public use whatsoever, * * * except where the gas is made or produced and distributed by the maker on or through private property solely for its own use or the use of its tenants and not for sale to or for the use of others.
>
> Par. 2. That every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for *any* facility or service furnished, or rendered, * * * shall be reasonable, just, *and non-discriminatory.*

IN THE MATTER OF THE VALUATION OF THE WASHINGTON GAS LIGHT CO. (the appellee Gas Company), Formal Case No. 56, Order No. 209, May 2, 1917, copies of which report are hereto attached, it was said by the Public Utilities Commission on page 5 of the report:

> The keynote to the law itself (The Public Utilities Law) is found in paragraph 2, and the key words of paragraph 2 are in the phrase, "that

every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate, and in all respects just and reasonable, and that the charge made for the same shall be reasonable, just and non-discriminatory." This paragraph imposed upon the utility in direct terms, for the benefit of *all* the people, the common law duty which it owes, as a calling impressed with a public interest, to furnish reasonable service at reasonable rates. Every line and paragraph of this law is in aid and assistance of paragraph 2. Every inquisitorial right and power given to the Commission; * * * and every duty imposed upon this Commission is to effectuate the right of the community to receive reasonable service at reasonable rates.

In the report of the Utilities Commission on the valuation of appellee Gas Company's property above referred to, nowhere does it appear that one of the considerations for the Government's permission to the Gas Company to do business in the District was that the Government should have gas at any price the latter should fix.

If Congress can fix any rate to be charged for gas furnished the General and District Governments, the rates can, of course, be made so low as to amount to the Governments' receiving their gas free. Now, suppose the demand for gas to be so supplied should be so great as practically to tax the producing capacity of the Gas Company, from what source would it receive funds with which to do business? Not from the Government, because it is not a Government enterprise, nor from the people of the United States as a whole because the gas is not used by all of them; but it is

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respectfully submitted, as must be concluded from the opinion of this Court in the instant case, the only source of revenue would be in the private consumers of gas in the District of Columbia, and if their wants are to be supplied only in the amount allowed by the Government, it would follow that the company would be forced to quit business, and no gas would be available either for the Governments or private consumers.

We respectfully submit that no such a situation was contemplated by Congress when the gas works were permitted to be established, and that this is fully evidenced by subsequent legislation referred to in appellant's briefs.

As was said by this Court in the *Consolidated Gas Case,* 212 U. S., 18, 45, in referring to that company,

> This corporation is one of that class which is subject to regulation by the legislature in the matter of rates, *provided they are not so low as to be confiscatory.*

In the instant case the Government rate and rates to certain other consumers are far below cost of production. Appellants' complaint in this respect *is,* that by reason of present conditions, they are forced to help make up the losses that otherwise the company would sustain by reason of the low rates to others than private consumers, and that the Utilities Commission, having the power, should have fixed rates to *all* users such as to be reasonable and nondiscriminatory.

As pointed out in our original brief, pp. 46, 47, and in our reply brief, pp. 24-26, appellants occupy the position suggested as not appearing in the Consolidated Gas Case, *supra,* p. 54, wherein this Court said:

> But neither the city *nor the consumers are* finding any fault with it (the lower rate to the city).

We respectfully submit that this statement is intended to warrant, and justifies, the assurance that private consumers would have a just ground for questioning the legality of a rate if the discrimination against them and in favor of the Government is one "for which good reasons could not be given."

Indeed, as pointed out in our original brief, pp. 26 and 27, counsel for the Gas Company stated at the hearing that it is but fair that the Government should pay the rate charged to the private consumer. Appellants have never contended for the same rate as that allowed to the Government, but if they are so entitled, as stated by counsel for the Gas Company, certainly, we submit, the other excepted consumers should not be permitted to have their gas at a price far below cost of production, and when such low rates are necessarily at the direct expense of the private consumers.

APPELLANTS' BILL DOES NOT ALLEGE, NEITHER HAVE THEY EVER CONTENDED, THAT THEY ARE ENTITLED TO THE SAME RATE AS CHARGED TO THE GOVERNMENT.

We call attention to this fact for the reason that the opinion of this Court further states:

> We do not consider whether the Commission has power to raise the price to the excepted class because, even if it has, the plaintiffs have no right to require equality with the Government and they have no other ground upon which to found their supposed right.

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As pointed out in our original brief, p. 44, wherein we said:

> So, in the Act of 1916, wherein Congress fixed a temporary rate of 70 cents to the Governments and 75 cents to private consumers in the District of Columbia, a legislative sanction was thereby placed upon a disparity of five cents in favor of the Government. We do not insist that after full investigation (and by this we mean a proceeding strictly in accordance with the requirements of the Utilities Act) the Public Utilities Commission would not be justified in finding that a disparity even greater than five cents would not be unduly discriminatory.

The bill alleged facts showing that the rates to appellants as fixed in the orders complained of are illegal on the grounds, *in addition to that of confiscation*, that—

> 1. They are unduly discriminatory as against the appellants and in favor of the Governments and other excepted consumers who are receiving gas at a price far below cost of production.
>
> 2. They were made by the Commission *in disregard* of the rates charged to the Governments and excepted consumers, and when said Commission should have considered and fixed rates to the latter as well as to the former, and at the same time prescribe reasonable and non-discriminatory rates to *all* users of gas in the District of Columbia *as required* by the Public Utilities Act. See *Sou. Pac. Co.* vs. *Interstate Com. Comm.*, 219 U. S. 433.
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> 3. The order fixing the 95-cent rate to appellants, being Order No. 314, and the second one complained of, was made by the Commission without the statutory notice having been given to cer-

tain parties to the hearing or investigation. See *Interstate Com. Comm.* vs. *L. & N. R. Co.*, 227 U. S. 88.

It is therefore submitted that the bill set forth the following grounds of illegality of the orders complained of:

1. Confiscation of appellants' property;

2. Undue discrimination against appellants and in favor of the Governments and excepted consumers;

3. Disregard by the Utilities Commission of its statutory powers to consider and adjust rates to the Government and excepted consumers.

4. Failure of said commission to consider and adjust said rates, and its action in placing the burden of increased expenses entirely on the private consumers; and

5. Failure of the Commission to conform to the requirements of the statute as to notice.

We also submit that these questions are squarely presented on the record and at great expense to petitioners, who are entitled to have them all passed upon by this Court, not only on the ground that their correct determination would result in sustaining their cause of action, but they are questions of vital interest to the people of the District of Columbia and should be settled now in order that the Utilities Commission in future investigations may be advised definitely in such matters.

Respectfully submitted,

ROSCOE F. WALTER,
Attorney for Appellants.

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CERTIFICATE OF COUNSEL

The undersigned, attorney for William Hollis and Sam Goodman, appellants in the above-entitled cause, hereby certifies that the above petition for rehearing is made in good faith, and that in his opinion said petition is well-founded in law.

ROSCOE F. WALTER,
Attorney for Appellants.